

Institutional Controls Roundtable

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Uniform Environmental Covenants Act (UECA): Adopting UECA in Minnesota--Pros and Cons as Seen By the Minnesota Pollution Control Agency

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Minnesota's Current Law and Practice regarding Environmental Restrictive Covenants

- First environmental restrictive covenant recorded by Minnesota Pollution Control Agency (MPCA) for State Superfund Site in 1994
- Restrictive covenants recorded for approximately 80 closed municipal landfills where State has taken over cleanup
- Numerous restrictive covenants for Brownfield risk-based cleanups, limiting use to commercial and industrial purposes and restricting disturbance of contamination control structures

Minnesota's Current Law and Practice regarding Environmental Restrictive Covenants (cont'd)

- State Superfund Law (MERLA) authorizes state to acquire property interests for cleanup purposes, defines “institutional controls” and expressly authorizes restrictive covenants
- MERLA relies on Minnesota Conservation Easement Law as basis for legal validity and duration of covenants

Potential Advantages to Adopting UECA in Minnesota

- UECA expressly overrides general laws that cause real property encumbrances to expire after period of years
- UECA expressly protects environmental covenants from other legal threats such as eminent domain, adverse possession, etc.
- MPCA sees value for regulated parties in uniformity of Minnesota law with other states

Potential Advantages to Adopting UECA in Minnesota

- Under UECA environmental agency can approve and enforce covenant without holding interest in real property
- Some Minnesota cleanup programs do not include authority to acquire interest in real property; those programs could use UECA covenants

Potential Disadvantages to Adopting UECA in Minnesota

- UECA is procedurally more complex for state agency to administer than current law
- UECA will require Minnesota to revise its covenant forms and guidance
- UECA provisions for modifying and terminating covenants

Potential Disadvantages of UECA (cont'd)

UECA Procedure to Modify or Terminate Covenant

- UECA disclaims intent to modify cleanup liability laws
- But UECA allows original property owners who sign covenant to control the use of property long after they have sold it in order to avoid future liability
- UECA requires that original signers consent to amendment or termination of a covenant
- in absence of consent, UECA leaves termination largely to a trial court proceeding; court's decision is not based on protection of environment and public health

MPCA's Position on Adoption of UECA in Minnesota

- MPCA negotiated amendments to UECA to adapt it to state environmental and administrative law
- With negotiated amendments, MPCA supports adoption of UECA
- Bill (S.F. No. 1426) sent to Senate floor on March 22, 2006, with MPCA's negotiated amendments

UECA amendments negotiated by MPCA

- **Modification and termination of a covenant**
 - Party must first apply to MPCA, which holds an administrative proceeding on the matter
 - Court appeal from an MPCA decision is on the record and based on substantial evidence
 - A party can apply directly to a trial court to terminate or modify the covenant if MPCA does not commence an administrative proceeding within 60 days of application
 - Agency or Court decision must be based on protection of public health and environment

UECA amendments negotiated by MPCA

- Amend UECA provision that limits covenants to property where agency approves a “remediation” project
 - covenants are sometimes used where MPCA issues a liability assurance but no remediation is required; investigation, monitoring and a covenant may be protective
 - covenants may be appropriate for closure of disposal facilities and tanks, where no remediation is currently required

UECA amendments negotiated by MPCA

- Add language to protect legal validity of covenants created under pre-UECA law
- Allow agency to set any reasonable conditions on approval of a covenant
- Allow exception to requirement that original signers consent to termination or modification of a covenant if original signers do not respond to certified mail notice.

Evaluating UECA By States That Already Use Environmental Covenants

- Evaluate UECA carefully
- Consider if there are benefits to adopting UECA for your State
- Is UECA adapted to law and practice in your State?
How will it change your law and practice?
- Develop amendments to address State concerns, giving consideration to uniformity goal of UECA